APPLICABILITY OF THE UNITED STATES COMMERCE ACT TO INTERSTATE TELEGRAPH COMPANIES.

SINCE the enactment of the United States Commerce Act almost twenty-eight years ago the great common carriers have lost their antipathy for this wise statute and now gratefully seek refuge under it from an avalanche of hostile legislation and decisions directed against them by legislatures and courts of the various States. The Interstate Commerce Commission, at first regarded with antagonism and suspicion by the corporations subject to its regulation, must be regarded now as a beneficent and protective force. The application of the Commerce Act, amended and supplemented as it has been at various times, presents most interesting questions of statutory construction. The important position occupied by the great cable and telegraph companies in modern life is just now particularly evident to this country eagerly awaiting news of the great conflict in Europe. The purpose of this discussion is to determine, if possible, the applicability of the United States Commerce Act, as amended and supplemented, to the telegraph, telephone and cable companies doing an interstate and international business. For purposes of convenience telegraph companies will be generally referred to, although the doctrine applicable to such corporations would seem in many instances equally applicable to other forms of communication by wire.

The importance (to the wire companies) of the question we are considering can hardly be exaggerated. In many of the States the statutes or decisions therein are highly inimical to the companies' interests. In several of the States [1] the right to recover for mental anguish unaccompanied by physical injuries obtains in actions against telegraph companies for the nondelivery or misdelivery of certain messages, while the Federal

[1] Texas, Tennessee, Alabama, Kentucky, North Carolina, Iowa, Louisiana, and Nevada. See 1 VA. L. REV. 337.

courts [2] may be said to have repudiated this pernicious doctrine. And the terms of the company's agreement to transmit and deliver messages entrusted to it, which terms are incorporated in the contract between the parties and evidenced by the express agreements printed on the back of all telegraph blanks,[3] are emasculated by the majority of the State courts. If the Commerce Act be held to apply to interstate wire communication, the situation in which the companies now find themselves may be greatly alleviated.

The Commerce Act in its original form was passed and approved February 4, 1887. Since that date it has been variously amended and supplemented.[4] But for the purpose of this paper

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[2] W. U. Tel. Co. *v.* Sklar (C. C. A.), 126 Fed. 295; Rowan *v.* W. U. Tel. Co., 149 Fed. 550; W. U. Tel. Co. *v.* Burris (C. C. A.) 179 Fed. 92; Kyle *v.* C. R. I. & P. R. R. Co. (C. C. A.), 182 Fed. 613.

[3] These agreements may be characterized as follows: (a) Classification of messages as repeated or unrepeated messages; (b) restriction of liability for transmission of messages unless special valuation is declared and additional rate paid thereon; (c) the sending company shall be considered the agent of the sender to forward the message over the lines of any connecting company when necessary; (d) definition of free delivery limits; (e) limitation of means whereby messages may be delivered to the company for transmission; (f) provision that all claims must be presented in writing within a certain period.

[4] The original Act of Feb. 4, 1887, has been variously amended and has also been supplemented by separate acts, e. g., the Elkins Act, which do not purport to amend specifically the Act of Feb. 4, 1887. But for our purpose the following may be said to be the component parts comprising the congressional legislation on interstate commerce, and styled for convenience the "United States Commerce Act:" Act of Feb. 4, 1887, Ch. 104, 24 Statutes at Large, 379; Act of March 2, 1889, Ch. 382, 25 Statutes at Large, 855; Act of Feb. 10, 1891, Ch. 128, 26 Statutes at Large, 743; Act of Feb. 11, 1893, Ch. 83, 27 Statutes at Large, 443; Act of Feb. 19, 1903, Ch. 708, 32 Statutes at Large, 847 (The Elkins Act; Interstate Commerce Act of 1903); Act of Feb. 25, 1903, Ch. 755, 32 Statutes at Large, 904; Act of June 29, 1896, Ch. 3591, 34 Statutes at Large, 584 (The Hepburn Act); Act of April 13, 1908, Ch. 143, 35 Statutes at Large, 60; Act of Feb. 25, 1909, Ch. 193, 35 Statutes at Large, 648; Act of June 18, 1910, Ch. 309, 36 Statutes at Large, 539 (The Commerce Court Act; also known as the Telegraph Act of 1910); Act of Aug. 24, 1912, Ch. 390, § 11, 37 Statutes at Large, 566 (The Panama Canal Act); Act of Oct. 22, 1913, Ch. 32, 38 Statutes at Large, 219, 221. See excellent article on the enforcement of the commerce act, by Mr. Karl W. Kirchwey in 14 Col. L. Rev. 211.

only the original Act as amended by the Hepburn Act and the Act approved June 18, 1910, familiarly known as the "Commerce Court Act," need be examined.

The original Act [5] reads as follows:

> "Be it enacted . . . . that the provisions of this Act shall apply to any common carrier or common carriers engaged in the transportation of passengers or property," etc.[6]

By the amendment of June 18, 1910,[7] which among other things created the Commerce Court subsequently abolished, § 1 of the original Act was made to read as follows:

> "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water *and to telegraph, telephone and cable companies, (whether wire or wireless) engaged in sending messages from one State, territory or district of the United States to any other State, territory or district of the United States or to any foreign country,* who shall be considered and held to be common carriers within the meaning and purpose of this Act.[8] . . . . provided, however, that the provisions of this Act shall not apply to . . . . nor shall they apply to the transmission of messages by telephone, telegraph or cable wholly within one State and not transmitted to or from a foreign country from or to any State or territory as aforesaid. . . . .
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> "All charges made for any service rendered or to be ren-

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[5] Ch. 104, 24 Statutes at Large, 379.

[6] For a history of the Commerce Act and a comparison with its English prototypes, see Int. Com. Comm. *v.* B. & O. R. R., 145 U. S. 263. See also C. N. O. & T. P. R. R. Co. *v.* I. C. C., 162 U. S. 184, 197, for a statement of Judge Jackson's famous dictum in the Party Rate Case, to the effect that if the carrier's rates be not reasonable or discriminatory the Act leaves the carrier as it was at common law.

[7] Ch. 309, 36 Statutes at Large, 539.

[8] For an explanation of the phrase, "Who shall be considered and held to be common carriers within the meaning and purpose of this Act," see the Pipe Line Cases, 234 U. S. 548, 559. See also, U. S. *v.* Erie R. Co. 213, Fed. 391.

dered in the transportation of passengers or property and for the transmission of messages by telephone, telegraph or cable as aforesaid, or any connection therewith, shall be just and reasonable and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; *Provided, that messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letters and commercial, press, government and such other classes as are just and reasonable and different rates may be charged for the different classes of messages.* And provided further, that nothing in this Act shall be construed to prevent telegraph, telephone and cable companies from entering into contracts with common carriers for the exchange of services."

And Section 3 now reads:

"That it shall be unlawful for any common carrier subject to the provisions of this Act, to make, or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," etc.

Section 6 has been amended and now reads as follows:

"That every common carrier, subject to the provisions of this Act, shall file with the commission created by this Act, and to print and to keep open to public inspection, schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any othr carrier by railroad, by pipe line or by water when a through route and joint rate have been established."

Section 15 has been amended and now provides that after a hearing upon complaint made as provided in Section 13 of the Act or after hearing on an investigation by the Interstate Commerce Commission on its own initiative, the Commission may, if it sees fit, condemn any existing rates or charges for the transportation of persons or property *"or for the transmission of messages by telegraph or telephone as defined in the first section*

of this Act," and "the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges to be thereafter observed in such case . . . ."

The Elkins Act (Feb. 19, 1903) as amended (June 29, 1906) may also be noticed to the extent that the same provides that

> "the wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense."

Doubt expressed by the Interstate Commission as to the application of the Elkins Act to telegraph companies will be referred to later.[9]

That communication by telegraph is commerce has long ago been decided. The leading case [10] under Commerce Clause of the Constitution contains this definition of the term: "Commerce undoubtedly is traffic; but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated

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[9] It is interesting to note that during the discussion of the Commerce Act in the Senate, the author of the bill and chairman of the Senate Committee to which it had been referred states (17 Cong. Rec. Pt. 4, p. 3472) "that the bill is not intended to affect the stage coach, the street railway, *the telegraph lines*, the canal boat or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects." This statement was considered with refence to the application of the Commerce Act to street railways in Omaha Street Railway *v.* I. C. C., 230 U. S. 324, 333, and it was stated by the court that "The meaning of a statute can not be determined from statements used in debate. . . . The act must be interpreted by its own terms and we must look to it as a whole in order to determine whether it applies to street railways. . . . " But in the Tap Line Cases, 234 U. S. 1, 27, the same court refers to "the debates which may be resorted to for the purpose of ascertaining the situation which prompted this legislation. . . . . "

[10] Gibbons *v.* Ogden, 9 Wheat. 1.

by prescribing rules for carrying on that intercourse. . . . . It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term." In Pensacola Telegraph Co. *v.* Western Union Tel. Co.,[11] the court referred to this case, saying:

> "Since the case of Gibbons *v.* Ogden (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. . . . . Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.
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> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successfully brought into use to meet the demands of increasing population and wealth."

In Western Union Tel. Co. *v.* Texas,[12] the court said:

> "The telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself."

Pendleton's case[13] is perhaps the leading authority on this subject, for there it was decided for the first time that the authority of Congress over the subject of commerce by telegraph with foreign countries or between the States, is supreme whenever that body chooses to exert its power; and it is also held that the States can impose no impediments to the freedom of that commerce. This general proposition is affirmed in Le-

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[11] 96 U. S. 1.
[12] 105 U. S. 460.
[13] W. U. Tel. Co. *v.* Pendleton, 122 U. S. 347.

loup *v.* Port of Mobile [14] and recent utterances of the United States Supreme Court.[15]

So, it is seen that telegrams constitute a modern instance of Interstate Commerce. By the Commerce Act in its present form Congress has entered the general field of legislation affecting interstate commerce, and the Act by a separate amendment is expressly made applicable to interstate wire companies. Can it not then be said that Congress has preempted from the field all legislation by the individual States? [16] Until this question is definitely answered by the Supreme Court we must laboriously reason from the numerous scattered opinions of that court indirectly dealing therewith.[17]

The case of Northern Pacific Ry. Co. *v.* Washington [18] decided that the passage of an Act of Congress regulating the hours of service for employees of interstate carriers rendered void various State laws on that subject *although the Federal Act did not go into effect for a year.*

In Southern Ry. *v.* Reid [19] it was held that the Hepburn Act of July 29, 1906, rendered void a State statute regulating interstate freight shipments.

Mondou *v.* N. Y. N. H. & H. R. R.[20] decided that the Federal Employers' Liability Act superseded all State regulations and all common law rules laid down by the State court on that subject.

In Chicago R. I. & P. Ry. *v.* Elevator Co.[21] it was held that the Hepburn Act rendered inoperative a State statute imposing a penalty for the failure of a carrier to furnish cars promptly.

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[14] 127 U. S. 640.

[15] W. U. Tel. Co. *v.* Commercial Milling Co., 218 U. S. 406; W. U. Tel. Co. *v.* Crovo, 220 U. S. 364; W. U. Tel. Co. *v.* Brown, 234 U. S. 542. Perhaps the latest utterance by a superior Federal Court on this subject is found in L. & N. R. Co. *v.* W. U. Tel. Co. (C. C. A.), 207 Fed. 1, 11.

[16] Houston & Texas Ry. Co. *v.* U. S., 234 U. S. 342, 250; M. K. & T. Ry. Co. *v.* Harris, 234 U. S. 412, 417.

[17] Various defenses under the Commerce Act have been interposed in telegraph cases now pending in inferior State courts throughout the country. Eventually this question must reach the U. S. Supreme Court. In this connection, see A. T. & S. F. Ry. Co. *v.* Robinson, 233 U. S. 173, 181, and M. K. & T. Ry. Co. *v.* Cade, 233 U. S. 642, 648.

[18] 222 U. S. 370.

[19] 222 U. S. 424.

[20] 223 U. S. 1.

[21] 226 U. S. 426.

N. Y. Central R. R. Co. *v.* Hudson County [22] decided that Congress having assumed jurisdiction over a particular interstate ferry, a State municipality could not thereafter regulate its charges.

In St. Louis, etc., Co. *v.* Edwards [23] it was held that a State penalty for delay in delivery of an interstate shipment is void under the Commerce Act.

In Boston & Maine R. R. *v.* Hooker [24] it was held that by the Hepburn Act and the Carmack Amendment thereto, Congress has assumed the regulation of interstate transportation of property to the exclusion of State control thereof "by their own policy or legislation."

The decision in Erie Railroad *v.* New York [25] comes nearer to the mark. There it was decided that a State statute attempting to regulate the hours of service of railroad, telegraph and telephone operators engaged in interstate commerce is void, because Congress has completely covered the field by the hours of Service Act of 1907, although that Act did not take effect until after the transaction sued on had accrued.

The original Interstate Commerce Act of Feb. 4, 1887, was extensively amended by the Hepburn Act approved June 29, 1906. Section 20 of the Act in its present form embraces the Hepburn Amendment and paragraphs 11 and 12 of that section, commonly known as the "Carmack Amendment," [26] specifically defines the carrier's liability or obligation under interstate contracts of shipment.

It has been repeatedly held that this part of the Commerce Act manifests the intention of Congress to assume legislative charge of the carrier's liability under its interstate shipments and, consequently, invalidates all legislation on that subject. The leading case is that of Adams Express Co. *v.* Croninger.[27] This

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[22] 227 U. S. 249.
[23] 227 U. S. 265.
[24] 233 U. S. 97.
[25] 233 U. S. 671.
[26] See Adams Express Co. *v.* Croniger, *supra*, p. 203. The Carmack Amendment is really an amendment to the Hepburn Act, itself amendatory of the original Commerce Act. *Query*, is the Amendment limited to Interstate Commerce to the exclusion of foreign commerce? See Hamlen & Sons Co. *v.* I. C. R. R. Co., 212 Fed. 324, 327.
[27] 226 U. S. 491.

case decided that although a carrier can not exempt itself from its own negligence, yet it may by a reasonable agreement with a shipper limit its liability to a sum commensurate with the tariff charged for the service rendered. And this case has been repeatedly followed.[28]

But the wording of the Carmack Amendment must be noted:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property . . . . and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law."[29]

It may be contended that the Carmack Amendment deals only with carriers "receiving property for transportation" inasmuch as only such carriers are specifically mentioned. This, of course, would exclude telegraph, telephone and cable companies. But this is too limited a construction to be placed upon an Act so evidently intended to be broad in its comprehension. As was said, the Act must be read in the light of the conditions existing at the time it was written and with adequate allowance made for changing condition.[30] The very evident intention of Congress was to regulate in all its phases the entire field of interstate commerce.[31] We have seen that the transmission of messages by wire is as much an instance of commerce as is the transporta-

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[28] C. B. & Q. E. R. Co. *v.* Miller, 26 U. S. 513; Wells, Fargo & Co. *v.* Neiman, Marcus Co., 227 U. S. 469; K. C. So. Ry. Co. *v.* Carl, 227 U. S. 639; C. R. I. & P. Ry. Co. *v.* Cramer, 232 U. S. 490; B. M. R. R. Co. *v.* Hooker, 233 U. S. 97; Western Union Tel. Co. *v.* Compton (Ark.), 169 S. W. 946.

[29] This proviso declared surplusage in Adams Ex. Co. *v.* Croninger, 226 U. S. 491, 507.

[30] W. U. Tel. Co. *v.* Pendleton, 122 U. S. 347, 358.

[31] Tex. & Pac. Ry. Co. *v.* I. C. C., 162 U. S. 197, 122. See also, I. C. R. R. Co. *v.* Belwen's Adm'r, 233 U. S. 473; Houston, etc., Ry. Co. *v.* United States, 234 U. S. 342.

tion of physical objects. Indeed it is not necessary that the Act specifically name telegraph companies. All that was necessary to secure the application of the Act to those companies was that Congress enter the legislative field, which necessarily embraces those corporations. The Commerce Act, as has often been pointed out, was intended to so regulate and control commerce in the States and with foreign countries that each individual could avail himself thereof with all of the rights and privileges of his neighbor. It is highly unreasonable to assume that Congress intended to protect the rights of the public patronizing the rail carriers, but to ignore patrons of the wire carriers.

The entire Act negatives such a construction. By § 3 thereof it is made unlawful for any carrier subject to the provisions of the Act to give any preference or advantage to any person, company or locality, or any particular kind of traffic, in any respect whatsoever, or to subject any of its patrons to any prejudice or disadvantage whatsoever. The whole subject of rates, regulations and practices is covered by the Act, which either deals with it directly or places it under the supervision of the Interstate Commerce Commission.

By the Telegraph Amendment of 1910 the *provisions of the Act* are made applicable to the wire companies engaged in interstate business and the Act must be construed so as to save rather than destroy its purpose. The clear purpose of Congress was to regulate interstate commerce in its entirety—to regulate interstate messages in the same essential respects as it regulates other forms of interstate commerce specifically referred to in the body of the Act. By making all the *provisions* of the Act applicable to wire companies it is made their duty to charge only reasonable rates for the different authorized classes of messages, and free service, with certain exceptions, is prohibited, as are all other preferences or advantages "in any respect whatsoever." The provisions of the Act impose upon the carriers to which those provisions are applicable, the duty to observe the uniform rules or obligation upon which the reason for the Act depends and which are embodied in it. It thus becomes the duty of the courts to construe the Act in accordance with the manifest intention of Congress and to enforce the uniform rule of obliga-

tion imposed by Congress upon all carriers subject to the provision of its Commerce Act. If this be not so and the various State laws are allowed to control the liability of wire companies, although exercising no control over other interstate carriers, violence will be done to the language of Congress as set forth in various sections of the Commerce Act, including §§ 1 and 20. The Federal government would then have under the same Act practically no control over interstate commerce by wire but complete control over such commerce by rail.

Mr. Justice Lurton uses this language in the Croninger opinion: [32]

> "To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy, will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment."

The court, it is true, is there referring to the control implied by the Act over the bills of lading and receipts provided for in the Carmack Amendment; and it may be urged that no such instruments obtain in the telegraph business. But such an objection is as specious as the objection that only carriers by rail are embraced in the terms of the Act.

Of course, Congress did not require telegraph companies to give and the public to accept receipts or bills of lading for telegrams. These are unnecessary in such a business from its very nature, and the practice of the telegraph companies in this respect is necessarily different from that of carriers of property subject to asportation or theft. The original message remains in the receiving office of the telegraph company and the blank upon which the message is written itself shows the contract for service and the agreed valuation according to a classification adopted by the sender and permitted by the Commerce Act. Of these facts Congress was certainly aware when it enacted the Commerce Act. So, the telegraph message itself takes the place of a bill

[32] 226 U. S. 491, 506.

of lading or receipt because the form on which it is written evidences the contract between the parties. The existence of such a written contract was the fact upon which the Croninger opinion turned; and the nonexistence thereof was the burden of Mr. Justice Pitney's dissent in the Hooker case,[33] where the objection to applying the Croninger decision to an action for the loss of baggage was that in such a case the only evidence of the agreement between the parties was the baggage check containing no contract.

This section then might stand alone as congressional regulation of the liability of telegraph companies under their contract as evidenced by the forms on which all messages must be written. Classification of messages is permitted by Congress and nothing remains to be done in case of a breach of contract but to adjust the damage by applying the uniform rule of liability demanded by the Act to the particular class of contract affected. The contract between a telegraph company and its patron was upheld in the Primrose case[34] cited with approval in the Croninger opinion. In the Primrose case it was held that a stipulation that the telegraph company shall not be liable for mistakes in the transmission or delivery of a message beyond the sum received for sending it, unless the sender orders it to be repeated and pays for such service, is valid. This case was decided before the adoption of the Telegraph Amendment to the Commerce Act in 1910, but since that time the Supreme Court has sustained a similar limitation in a contract between the railroad and a shipper. In M. K. & T. Ry. Co. *v.* Harriman Bros.,[35] decided in 1913, a stipulation that an action for damage to the shipment must be brought within ninety days after the damage was sustained, was held to be valid under the Carmack Amendment, the court saying:

> "The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, pro-

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[33] 233 U. S. 97, 154.

[34] 154 U. S. 1.

[35] 227 U. S. 657, 672. And in this connection, see I. C. C. Conf. Rul. No. 456, delivered March 2, 1914.

vided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence." [36]

If the Commerce Act does apply to wire companies doing an interstate business it effectually invalidates the various State statutes providing for a recovery for mental anguish, special damages, etc., in so far as those statutes affect the interstate messages; otherwise the localities in which such statutes obtain would be receiving privileges or advantages over neighboring States which have enacted no such laws. This would be contrary to the express inhibition of § 3 of the Act forbidding the giving of any preference or advantage to any person, firm, corporation, locality, or any particular description of traffic *in any respect whatsoever*. In this connection see Houston & Texas Ry. Co. *v.* United States: [37]

"That an unjust discrimination in the rates of a common carrier by which one person or locality is unduly favored as against another under substantially similar conditions of traffic constitutes an evil, is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear."

The arbitrary classification of telegraph companies for the purpose of imposing a civil liability for mental anguish can not be justified by any precedent under the police powers of the State, and such a classification violates the fundamental principle that all classification must, under the privileges and immunities clause of the 14th Amendment "always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." [38]

It will be noted that § 6 of the Commerce Act provides:

"that every common carrier subject to the provisions of this

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[36] Wherein consider Judge Jackson's dictum affirmed in C. N. O. & T. P. R. R. Co. *v.* I. C. C., 162 U. S. 184, 197.

[37] 234 U. S. 342, 354.

[38] Railroad Co. *v.* Ellis, 165 U. S. 150.

> Act shall file with the Commission created by this Act, and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation," etc.

Section 1 of the Act provides (paragraph 3) that

> "all charges made for any services rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as aforesaid or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service, or any part thereof, is prohibited and declared to be unlawful;"

and then follows the express sanction of the classification of messages into day, night, repeated, unrepeated, letter, etc. And in this connection it must be noted that § 15 provides that after complaint and hearing, or upon action by the Commission upon its own initiative, the Commission may regulate the rates or charges of any carrier of persons or "of messages by telegraph or telephone as defined in the first section of this Act."

It might, therefore, be supposed that carriers by wire must file with the Commission their rates or tariffs in order to avail themselves of the other provisions of the Act. But it must be remembered that § 1 of the Act, though it makes "the provisions of this Act" applicable to wire companies, yet paragraph three of that same section expressly sanctions the classification of messages by wire into certain divisions then already used by the companies. And Congress must have been aware that those divisions of messages provided for were already in effect and were based on different rates for the different service rendered, e. g., repeated and unrepeated messages. Moreover, not only the classifications set out in the Act and already then existent were approved by it, but "such other classifications as may be just and reasonable" without any requirement that the approval of the Commission be first secured, although the Commission was given power to disprove and alter the rates charged.[39] So, it must be seen that the provisions of the Act made applicable to the wire companies

[39] § 15.

in § 1, as amended by the Telegraph Act of 1910, are not each and every provision of the entire Act, some of which are wholly unnecessary to the business transacted by such corporations but rather those provisions which apply to telegraph, telephone and cable companies in the very nature of things. The language used in the telegraph amendment was simply intended to show that it was the purpose of Congress to apply the Commerce Act to wire companies in all of its essential parts.

As soon as the Telegraph Amendment was passed in 1910 the question at once arose whether all of the provisions of the Commerce Act applied to telegraph and telephone companies, or whether some of the provisions were not applicable; and if so, which. Several Conference Rulings by the Commission have resulted. The immediate question to be determined was the applicability of the requirement of § 6 for the filing of rates for the transportation of passengers and freight. A hearing was had December 7, 1910, and as a result the Commission ruled [40] that telegraph and telephone companies doing an interstate business were subject to the provisions of §§ 1, 3, 15 and 20 of the Act. It will be remembered that § 1 provides that charges shall be just and reasonable; § 3 forbids discrimination; § 15 provides machinery for the enforcement of §§ 1 and 3, and § 20 relates to the method of keeping accounts and making reports. It had previously been decided [41] that paragraph 5 of § 15, giving a shipper the right to route his shipments by the carrier, did not apply to telegraph companies.

In the 24th Annual Report of the Interstate Commerce Commission, page 32, it is pointed out that the Telegraph Amendment of June 18, 1910, places telephone and telegraph companies doing an interstate business under the jurisdiction of the Commission, and it is remarked that § 20 of the Act may easily be administered to telegraph companies; but the Commission expresses doubt whether Congress intended to place the numerous telephone companies, with provisions for interstate communication, under the regulation of the Commission.

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[40] Conf. Rul. No. 305 of March 13, 1911. See Conf. Rul. Bulletin No. 6.

[41] Conf. Rul. No. 291 of October 11, 1910.

In the 25th Annual Report of the Commission, dated Dec. 20, 1911, in discussing the application of the Act to telephone, telegraph and cable companies, the Commission referred to its ruling of March, 1911, and further stated that it was the opinion of the Commission that § 6 of the Act did not apply to those companies, and that additional legislation was, in its opinion, necessary to make that section apply, which legislation was requested but has not yet been obtained. Those parts of the Report referred to read as follows:

> "There appears to be no requirement for publication, filing and posting of the schedules of charges for the transmission of telegraph, telephone or cable messages between different places on the same route or line, or from a place on one route or line to a place on another route or line."

After stating that the Commission believed that the wire companies should be required to file and post their tariffs for interstate messages the Report concludes:

> "We recommend, therefore, that § 6 of the Act be amended so as to require telephone, telegraph and cable companies to publish, file and post schedules of their interstate charges in such manner and to such extent as may be required by the Commission."

Attention is then called to "the apparent necessity for changes in the Elkins Act in order to make it clearly applicable to telephone, telegraph and cable companies."

In its 26th annual Report, page 70, the Commission repeats its recommendation of 1911 for "a more explicit definition of the authority of this Commission over telegraph and telephone lines." And in the 27th Report, issued in 1913, page 3, it is remarked: "There has been no change in the situation with respect to telephone, telegraph and cable companies as outlined in our 25th Annual Report, as to the application of § 6 of the Act and of the Elkins Act to such companies."

There would seem to be no objection on the part of the telegraph and telephone companies to filing with the commission their schedule of rates except that the admission of the principle that wherever the term *transportation* is used in the Act it must

be regarded as including the *transmission* of messages by wire, would involve the wire companies in countless difficulties, if not impossibilities, with respect to other sections of the Act.[42]

The writer is also under the impression that the Commission has informally expressed its opinion that § 4 of the Act (the Long and Short Haul Provision) does not apply to telegraph or telephone companies.

At a General Session held October 13, 1913, the Commission approved a printed form of instructions for a uniform system of accounts to be tabulated by telegraph and cable companies exclusive of wireless telegraph companies, in accordance with § 20 of the Commerce Act. These instructions are now issued in pamphlet form by the Commission but are of no general interest.

There now remain for consideration several decisions directly affecting telegraph companies.

The case of Western Union Tel. Co. *v.* James[43] was decided by the Supreme Court of the United States in 1895. The case involved an action for a penalty allowed under a Georgia statute for the failure to deliver promptly a telegram. The message sued on had been sent from a point in the State of Georgia to a town in Alabama. The question decided by the court was "whether the statute of the State of Georgia providing for the recovery of such penalty is a valid exercise of the power of the State in relation to messages by telegraph from points outside and directed to some point within the State of Georgia." The opinion refers to the Act of Congress of July 24, 1866, affecting telegraph companies[44] and points out that this act does not embrace the delivery of messages as provided for in the State statute. It is then pointed out that the company's obligation to deliver its messages is not a topic which the absence of Federal legislation reserves for congressional action, but is rather one

[42] For further rulings by the Commission in conference which affect directly or indirectly telegraph, telephone and cable companies see Supplement No. 1 to Conf. Rul. Bulletin No. 6; particularly Conf. Rul. 407, 410, 412, 420, 426, 456 and 460.

[43] 162 U. S. 650.

[44] U. S. Revised Statutes, §§ 5263 to 5269.

which inheres in the State until such action by Congress is taken, the court saying at page 655:

> "The matters upon which the silence of Congress is equivalent to affirmative legislation are national in their character, and such as to fairly require uniformity of regulation upon the subject-matter involved affecting all the States alike."

The court then concludes that the Georgia statute considered was but a mere police regulation which only incidentally affected interstate commerce, and as such was valid until Congress saw fit to legislate on the subject. But it was remarked that no attempt was there made to enforce the provisions of the State statute beyond the limits of the State.

In Western Union Tel. Co. *v.* Commercial Milling Co.,[45] decided by the Supreme Court in 1910, the action was one to recover compensatory damages for failure to deliver a telegram originating in Michigan and addressed to a party in Missouri under a Michigan statute providing for recovery, notwithstanding the limitation of liability written into the contract to transmit. The question was whether this statute [46] was a violation of the Commerce Clause with respect to an interstate message. It must be noted that the liability imposed by the State statute was the same liability theretofore enforcible under the common law. The statute was sustained although the negligence complained of occurred outside of Michigan, and either in Illinois or Missouri. But it must be noted that in either of those States the liability of the telegraph company would have been the full liability imposed by the Michigan statute. This decision is authority, therefore, only to this extent—that the Michigan statute invalidating a limitation imposed upon the carrier's liability by the carrier itself was invalid in the courts of Michigan, the liability imposed being that of the *lex loci delicti* (Illinois or Missouri) and in force in Michigan before the passage of the statute considered. This case is not authority for the proposition that a State may extend its police power beyond

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[45] 218 U. S. 406.

[46] See Jacob *v.* W. U. Tel. Co., 135 Mich. 600, 98 N. W. 402.

its own limits.[47] It simply authorizes a State to forbid the making within its borders of a contract limiting the carrier's general common law liability.

In 1911 the Supreme Court decided the case of Western Union Tel. Co. *v.* Crovo.[48] This case involved an action for a statutory penalty allowed in Virginia for the negligent failure to transmit telegrams promptly. The message involved was an interstate transaction originating in Virginia and terminating in New York. As stated by the court at page 369:

> "The only question for decision is whether a statute of the State of Virginia which imposes a penalty for the failure to transmit a dispatch received at an office of the company in the State for transmission to a person in another State is a valid exercise of the power of the State, *the delay occurring in the State.*"

After discussing the James and the Commercial Milling Company cases, *supra,* the court concluded that the Virginia statute was valid because it amounted to a police regulation of the State only indirectly affecting commerce and imposing a penalty on the carrier for a failure to perform a clear common law duty; and moreover, because the negligent act was shown to have occurred in Virginia.[49]

The latest utterance of the Supreme Court on this topic is its decision in the case of Western Union Tel. Co. *v.* Brown [50] decided last June. This was an action for mental anguish due to the negligent failure to deliver a telegram announcing the death of plaintiff's sister. The message originated in South Carolina and was addressed to Washington, D. C., at which place the negligence complained of occurred. The action was brought in South Carolina and resulted in a verdict for $750, as authorized by the statute of that State making mental suffering itself

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[47] See W. U. Tel. Co. *v.* Davis, 114 Va. 154, 75 S. E. 766.

[48] 220 U. S. 364.

[49] Both the Commercial Milling Co. case and the Crovo case, *supra,* arose out of transactions occurring prior to the passage of the Telegraph Amendment June 18, 1910. Indeed, the absence of congressional legislation is remarked on in the Crovo opinion at page 372.

[50] 234 U. S. 542.

a cause of action. The court's opinion by Mr. Justice Holmes is regretably brief and quite unsatisfactory. The judgment of the State court was reversed apparently upon two grounds: First, because the South Carolina Mental Anguish Statute, as applied, attempted to define the liability of the telegraph company for negligence occurring outside of that State; and. second, because it was an attempt to regulate interstate commerce. The opinion concludes as follows:

> "But the act also is objectionable in its aspect of an attempt to regulate commerce among the States. That is, as construed it attempts to determine the conduct required of the telegraph company in transmitting a message from one State to another, or to this district, by determining the consequences of not pursuing such conduct, and in that way encounters Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, a decision in no way qualified by Western Union Tel. Co. *v.* Commercial Milling Co., 218 U. S. 406."

It is extremely unfortunate that the court dismissed this phase of the matter so summarily.

The Supreme Court of Appeals of Virginia has also spoken on this question in Western Union Tel. Co. *v.* Bilisoly.[51] The action was brought by Bilisoly to recover a penalty allowed by statute for alleged delay in the delivery of a "night letter" sent from New York City to the plaintiff at Norfolk, Va. Judgment of the lower court for the plaintiff was reversed. The court pointed out that the Virginia statute being penal in its nature must be strictly construed and that it was doubtful whether same could be extended to apply to a special contract, such as is involved in the transmission of a "night letter." The court, however, does not rest its conclusion upon this ground but goes on to cite the Act of Congress approved June 18, 1910, placing telegraph companies, so far as interstate business is concerned, under the jurisdiction of the Interstate Commerce Commission and subjecting these companies to the same regulations imposed upon common carriers in general. The opinion by Judge Harrison points out that the Act has occupied the entire field, and while

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[51] 82 S. E. 91.

impliedly exempting telegraph companies from any penalty for negligence it has provided a severe maximum penalty for intentional discrimination.[52] The court said:

> "Before the passage of this Act there had been no legislation by Congress affecting or conflicting with the State statutes imposing a penalty for failure to deliver messages promptly and, therefore, the State statutes affecting telegraph companies were upheld, even as to interstate messages, upon the ground that unless Congress had legislated upon the subject matter of telegraph companies the State statutes were applicable (citing the James case, the Commercial Milling Co. case and the Crovo case heretofore referred to). . . . It is sufficient to say that by it (Telegraph Amendment of June 18, 1910) Congress has occupied the field of regulation with respect to interstate telegrams, and hence the State statute imposing a penalty for failure to make prompt delivery can no longer be invoked in such cases. The Act of Congress has ousted the State of jurisdiction over the subject."

It may be remarked in passing that the Bilisoly opinion reversed a contrary ruling on this question by the Virginia court in Major *v.* Western Union Tel. Co. now pending on writ of error to the Supreme Court of the United States.

Williams *v.* Western Union Tel. Co., decided by the United States District Court for the Eastern District of Pennsylvania in 1913, is also in point.[53] That was an action for damages for the misdelivery of a commercial telegram sent from Pennsylvania to Florida. It was proven that the contract between the parties, as evidenced by the form on which the message was written, contained a limitation of the company's liability for the correct delivery of unrepeated messages. The court held that the plaintiff was bound by this contract limitation under the Croninger case. This dictum also appears:

> "Even if the plaintiff's case were based upon an alleged unreasonable regulation, which it is not on the pleadings, it is a question which can not be entertained primarily in this

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[52] Reference is to § 10 of the Commerce Act as amended.

[53] 203 Fed. 140.

court. The question must be first raised before the Interstate Commerce Commission." [54]

The Municipal Court for Philadelphia County, Pennsylvania, has recently passed on this question in the case of Strause Gas Iron Co. *v.* Western Union Tel. Co., decided at the January Term, 1914. The case involved damages for an undelivered night letter sent from a point in Pennsylvania to a point in Michigan. The telegraph blank contained the usual limitation of damages to fifty dollars. After citing the Carmack Amendment and the Croninger case which the court referred to as "deliberate judgment upon the precise Federal question involved in this case" it was held that the contract limitation prevailed and plaintiff's recovery was limited to fifty dollars, the court saying:

"A common carrier may, by a fair, just and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage, to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk." [55]

The record in the Major case, *supra*, discloses that the plaintiff contended that although the Virginia statute had been superseded as to interstate transactions, yet the breach complained of occurred *after the message had reached the Virginia office* but before actual delivery to the addressee and that, therefore, the interstate phase of the transaction had ended. This contention is of general interest because, were it well taken, it would materially hamper the application of the Commerce Act. The argument is, however, specious and was well answered by the assertion that the contract between the plaintiff and the defendant, upon which Congress had legislated, was one to transmit *and*

[54] See Texas & Pac. Ry. Co. *v.* Abileene Oil Co., 204 U. S. 426; B. & O. R. R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481; Great Northern Ry. Co. *v.* O'Connor, 232 U. S. 508. Wherein consider telegraph companies are not required by the Act to file their tariffs as argued *supra*, this article.

[55] It was erroneously stated in this opinion that the Western Union Telegraph Company had previously filed with the I. C. C. its tariff of rates. While this was not the case, yet the omission should not and doubtless would not have affected the decision. See *supra*, this article.

deliver the message, not merely to transmit same, and the contract is not performed until the message is actually delivered to the addressee.[56] The delivery of messages after transmission is as necessary a part of the handling thereof as the transmission itself. That the Act applies as much to the delivery as to the transmission of messages may be argued by analogy from the decision in Southern Railway Co. *v.* Reid.[57]

In Western Union Tel. Co. *v.* Chiles,[58] it is interesting to note that the Supreme Court has held a State penalty statute has no application to a transaction occurring on government property. The action was one for the penalty allowed by the Virginia statute for the nondelivery of a telegram sent from Richmond, Va., to Chiles, a gunner stationed on a war ship lying in the Norfolk Navy Yard. An instruction was denied by the State court that if the default in delivery occurred within the limits of the territory of the Navy Yard, the Virginia statute had no application. The Supreme Court pointed out that the Navy Yard "is one of the places where the Congress possesses exclusive legislative power. It follows that the laws of the State of Virginia, with the exception referred to in the acts of Assembly (service of process) can not be allowed any operation or effect within the limits of the yard." Judgment of the State court was reversed.

Before closing it may be well to consider whether or not the transmission of a telegram originating and terminating at points within the same State but passing in transit beyond the limits of that State, constitutes interstate commerce. As a general proposition such commerce does constitute commerce between the States, and as such is beyond the reach of the State legislatures for all purposes except taxation.

In Hanley *v.* Kansas City Southern Ry. Co.[59] it was decided by the Supreme Court that a rate regulation promulgated by the State of Arkansas was inapplicable to shipments from Ft. Smith, Ark., to Grannis, Ark., and passing through Indian territory in

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[56] See W. U. Tel. Co. *v.* Com. Milling Co., 218 U. S. 406, 420.

[57] 222 U. S. 424. The court says, at page 440: "And transportation means, not only the physical instrumentalities, but all services in connection with receipt, delivery and handling of property transported. . . . "

[58] 214 U. S. 274.

[59] 187 U. S. 617.

transit on a through bill of lading on the ground that same was unconstitutional in its attempt to affect interstate commerce. The court said:

> "The transportation of these goods certainly went outside of Arkansas and we are of opinion that in this aspect of commerce it was not confined within the State;"

and then quoted from Pacific Coast Steamship Co. *v.* Railroad Commissioners [60] as follows:

> "To bring the transportation within the control of the State as part of its domestic commerce the subject transported must be within the entire voyage under the exclusive jurisdiction of the State."

See also L. & N. R. R. Co. *v.* Allen,[61] a recent decision by the Court of Appeals of Kentucky, deciding that a shipment between two points in Kentucky but passing in transit through a portion of Tennessee constituted interstate commerce and citing with approval the Hanley case, *supra.*

The distinction between taxation and other attempts by a State to regulate commerce of this nature, is pointed out in the Hanley case with direct reference to the case of Lehigh Valley R. R. Co. *v.* Pennsylvania,[62] the progenitor of this distinction. There the State of Pennsylvania had taxed certain railroad shipments from one point in Pennsylvania to another point in that State which passed in transit through a portion of New Jersey. The tax under consideration was imposed only upon that proportion of the transportation effected within the State of Pennsylvania; and it was held that the tax was valid and not an interference with commerce between the States. The opinion clearly distinguishes between taxation and other forms of State regulation of commerce.

It would seem, therefore, that for all purposes except taxation, a telegram originating and terminating in one State, but passing in transit through another State, constitutes interstate commerce and, as such, is beyond the legislative power of either State.

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[60] 9 Sawyer 253.

[61] 152 Ky. 145, 153 S. W. 198.

[62] 145 U. S. 192, affirmed in Ewing *v.* City of Leavenworth, 226 U. S. 464.

To briefly summarize, it is manifest that telegraphy is a form of commerce and that telegraph companies are common carriers within the technical definition of that term. The Commerce Act clearly indicates the intention of Congress to assume legislative control of interstate commerce in all of its phases. The provisions of the Act as amended and supplemented unify under Federal control the duties and liabilities of interstate carriers in their relations with the public, and the Telegraph Amendment to the Commerce Act expressly makes the provisions of that Act applicable to the wire companies. The Commerce Act being remedial in its nature must be construed in the light of that kindly maxim of the law *ut res valeat magis quam pereat.* Rulings of the Interstate Commerce Commission in conference and the various decisions of the State and Federal courts decided since the Pendleton case, show the application of the Act by the administrative and judicial tribunals. It is clearly indicated that the Commerce Act, and especially the Carmack Amendment, effectually nullifies the various State statutes inflicting upon telegraph companies various penalties and special damages, including damages for mental anguish. As Mr. Justice Hughes has said: [63]

> "It is unnecessary to repeat what has already been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power, that where it exists it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating State legislation.' By virtue of the comprehensive terms of the grant the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control."

Wm. Overton Harris.

LOUISVILLE, KY.

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[63] Houston & Tex. Ry. Co. *v.* U. S., 234 U. S. 342, 350